

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

JAMES HENRY GREEN,

Petitioner,

vs.

E.K. McDANIEL, *et al.*,

Respondents.

3:11-cv-00230-ECR-VPC

**ORDER**

This is a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in which petitioner, a state prisoner, is proceeding *pro se*. Before the court is respondents' motion to dismiss. (ECF No. 16.) Petitioner has opposed the motion. (ECF No. 25.) After a thorough review, the court grants the motion in part and denies the motion in part.

**I. Preliminary Matters**

Before turning the motion to dismiss, the court addresses two outstanding motions. First, petitioner has moved for copies of the trial transcript from his criminal case C238875. (ECF No. 10.) The transcripts requested by petitioner are included in the exhibits attached to respondents' motion to dismiss. Accordingly, the court denies the motion as moot.

Second, respondents move to substitute Renee Baker in place of E.K. McDaniel as a respondent in this action because Baker has succeeded McDaniel as the warden of Ely State Prison. (ECF No. 24.) The court grants the motion and substitutes Renee Baker for E.K. McDaniel as a respondent.

**II. Procedural History and Background**

On December 14, 2007, the State of Nevada filed an information in the Eighth Judicial District

1 Court for the State of the Nevada (“District Court”) charging Petitioner, James Henry Green, with one  
2 count of attempted murder with use of a deadly weapon, one count of battery with use of a deadly  
3 weapon resulting in substantial bodily harm, and one count of mayhem with use of a deadly weapon.  
4 (Exhibits to Mot. to Dismiss Ex. 1, ECF No. 17.)<sup>1</sup> After a jury trial, the jury returned a verdict finding  
5 petitioner guilty of one count of attempted murder with use of a deadly weapon and one count of  
6 mayhem with use of a deadly weapon. (*Id.* Ex. 6.) The District Court sentenced petitioner to 60 to 240  
7 months for the attempted murder charge, with an equal and consecutive term for use of a deadly weapon,  
8 with the sentence to run consecutive to criminal case C238876. (*Id.* Ex. 8.) The District Court  
9 dismissed the mayhem charge as redundant and issued its judgment of conviction on June 13, 2008.  
10 Petitioner appealed. (*Id.* Ex. 9.) On May 13, 2009, the Nevada Supreme Court affirmed petitioner’s  
11 convictions. (*Id.* Ex. 12.)

12 On May 3, 2010, petitioner filed a post-conviction petition in District Court. (*Id.* Ex. 13.) The  
13 District Court denied post-conviction relief on July 24, 2010. (*Id.* Ex. 14.) Petitioner appealed the  
14 denial to the Nevada Supreme Court. (*Id.* Ex. 15.) On January 13, 2011, the Nevada Supreme Court  
15 affirmed the District Court’s decision. (ECF No. 8-2 at 1-6.)

16 Petitioner filed his federal petition for writ of habeas corpus in this court on March 26, 2011.  
17 (ECF No. 1.) Respondents move to dismiss several grounds in the petition because they are  
18 unexhausted.

### 19 **III. Exhaustion**

20 Respondents move to dismiss grounds 1A, 1B, 3D, 4C, 5B, 5D, 5E, 5F, 5G, and 6B(1)-(5) as  
21 unexhausted because these grounds have never been addressed by the Nevada Supreme Court.

22 In response, petitioner provides his opening brief presented to the Nevada Supreme Court on  
23 appeal from the denial of his state post-conviction petition to show that he fairly presented his claims.

24 A federal court will not grant a state prisoner’s petition for habeas relief until the prisoner has  
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26 <sup>1</sup> The exhibits referenced in this order are found in the court’s record at ECF No 17, which were  
filed with respondents’ motion to dismiss.

1 exhausted his available state remedies for all claims raised. *Rose v. Lundy*, 455 U.S. 509 (1982); 28  
2 U.S.C. § 2254(b). A petitioner must give the state courts a fair opportunity to act on each of his claims  
3 before he presents those claims in a federal habeas petition. *O’Sullivan v. Boerckel*, 526 U.S. 838, 844  
4 (1999); *see also Duncan v. Henry*, 513 U.S. 364, 365 (1995). A claim remains unexhausted until the  
5 petitioner has given the highest available state court the opportunity to consider the claim through direct  
6 appeal or state collateral review proceedings. *See Casey v. Moore*, 386 F.3d 896, 916 (9th Cir. 2004);  
7 *Garrison v. McCarthy*, 653 F.2d 374, 376 (9th Cir. 1981).

8 A habeas petitioner must “present the state courts with the same claim he urges upon the federal  
9 court.” *Picard v. Connor*, 404 U.S. 270, 276 (1971). The federal constitutional implications of a claim,  
10 not just issues of state law, must have been raised in the state court to achieve exhaustion. *Ybarra v.*  
11 *Sumner*, 678 F. Supp. 1480, 1481 (D. Nev. 1988) (citing *Picard*, 404 U.S. at 276)). To achieve  
12 exhaustion, the state court must be “alerted to the fact that the prisoner [is] asserting claims under the  
13 United States Constitution” and given the opportunity to correct alleged violations of the prisoner’s  
14 federal rights. *Duncan v. Henry*, 513 U.S. 364, 365 (1995); *see Hiivala v. Wood*, 195 F.3d 1098, 1106  
15 (9th Cir. 1999). It is well settled that 28 U.S.C. § 2254(b) “provides a simple and clear instruction to  
16 potential litigants: before you bring any claims to federal court, be sure that you first have taken each  
17 one to state court.” *Jiminez v. Rice*, 276 F.3d 478, 481 (9th Cir. 2001) (quoting *Rose v. Lundy*, 455 U.S.  
18 509, 520 (1982)). “[G]eneral appeals to broad constitutional principles, such as due process, equal  
19 protection, and the right to a fair trial, are insufficient to establish exhaustion.” *Hiivala v. Wood*, 195  
20 F.3d 1098, 1106 (9th Cir. 1999) (citations omitted). However, citation to state caselaw that applies  
21 federal constitutional principles will suffice. *Peterson v. Lampert*, 319 F.3d 1153, 1158 (9th Cir. 2003)  
22 (en banc).

23 A claim is not exhausted unless the petitioner has presented to the state court the same operative  
24 facts and legal theory upon which his federal habeas claim is based. *Bland v. California Dept. of*  
25 *Corrections*, 20 F.3d 1469, 1473 (9th Cir. 1994). The exhaustion requirement is not met when the  
26 petitioner presents to the federal court facts or evidence which place the claim in a significantly different

1 posture than it was in the state courts, or where different facts are presented at the federal level to  
2 support the same theory. *See Nevius v. Sumner*, 852 F.2d 463, 470 (9th Cir. 1988); *Pappageorge v.*  
3 *Sumner*, 688 F.2d 1294, 1295 (9th Cir. 1982); *Johnstone v. Wolff*, 582 F. Supp. 455, 458 (D. Nev. 1984).

4 A. Grounds 5B, 5D

5 In ground 5B, petitioner claims that his right to due process was violated when the prosecution  
6 suppressed evidence of the extensive criminal history of victim Kevin Tippens, including the  
7 arrangements provided to him in exchange for his testimony. In ground 5D, petitioner claims that his  
8 right to due process was violated when the state district court failed to make factual findings on certain  
9 issues and arrived at conclusions that were not supported by the record.

10 After reviewing the record, including the opening brief provided by petitioner, the court  
11 concludes that grounds 5B and 5D are unexhausted because petitioner failed to fairly present them to  
12 the Nevada Supreme Court. Accordingly, the court grants respondents motion to dismiss grounds 5B  
13 and 5D as unexhausted.

14 B. Grounds 1A, 1B, 2A, 3D, 4C, 5E, and 6B(1)-(5)

15 In ground 1A, petitioner claims that his right to due process was violated because the selection  
16 process for the court was arbitrary and capricious due to the prosecutor displaying a conscious  
17 indifference to a procedural rule. In ground 1B, petitioner claims that his right to due process was  
18 violated because the state failed to acquire jurisdiction by criminal complaint. In ground 2A, petitioner  
19 claims that his right to effective assistance of counsel was violated because there was a conspiracy  
20 between his court-appointed attorney and the prosecutor. In ground 3D, petitioner claims his right to  
21 due process was violated because the state district court issued a defective order of commitment without  
22 probable cause. In ground 4C, petitioner claims that his right to effective assistance of counsel was  
23 violated because “procedural failure is attributable to intentional decision by a rogue court-appointed  
24 attorney but not made in interest of client.” In ground 5E, petitioner claims that his right to due process  
25 was violated by the state district court’s cumulative errors because it: (1) responded to juror questions  
26 without consulting with counsel; (2) limited defendant’s presentation of the evidence regarding the

1 violent character of victim Kevin Tippens; and (3) ordered defendant committed without a probable  
 2 cause hearing or his presence.<sup>2</sup> In ground 6B, petitioner claims that his right to effective assistance of  
 3 counsel was violated when his court-appointed attorney: (1) failed to conduct an investigation and  
 4 present mitigating evidence to the jury; (2) failed to object to unconstitutional jury instructions; (3) failed  
 5 to interview any witnesses; (4) failed to effectively cross-examine Kevin Tippens; and (5) failed to  
 6 mention evidence that petitioner was being robbed.

7 The court's review of the documents submitted by the parties demonstrates that the above  
 8 grounds were fairly presented to the Nevada Supreme Court. Accordingly, the court denies respondents'  
 9 motion to dismiss these grounds as unexhausted.

#### 10 **IV. Failure to State a Claim**

11 Respondents argue that grounds 1A, 1B, 2A, 2B, 2C, 2D, 4C, and 5E are vague and conclusory  
 12 and fail to state a claim.

13 In federal habeas petitions, notice pleading is not sufficient. Mere conclusions of violations of  
 14 federal rights without specifics do not state a basis for habeas corpus relief. *Mayle v. Felix*, 545 U.S.  
 15 644, 649 (2005); *O'Bremski v. Maass*, 915 F.2d 418, 420 (9th Cir. 1990); *Jones v. Gomez*, 66 F.3d 199,  
 16 205 (9th Cir. 1995). Conclusory allegations not supported by specific facts are subject to summary  
 17 dismissal. *Blackledge v. Allison*, 431 U.S. 63, 74 (1977). *Pro se* pleadings, however, must be liberally  
 18 construed. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007).

19 In ground 1A, petitioner claims that his right to due process was violated because the selection  
 20 process for the court was arbitrary and capricious due to the prosecutor displaying a conscious  
 21 indifference to a procedural rule. In ground 1B, petitioner claims that his right to due process was  
 22 violated because the state failed to acquire jurisdiction by criminal complaint. In ground 2A, petitioner  
 23 claims that his right to effective assistance of counsel was violated because there was a conspiracy  
 24 between his court-appointed attorney and the prosecutor. In ground 2C, petitioner claims that his right

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 26 <sup>2</sup> Respondents divide ground 5E into three subparts and address each as a separate claim. However, it appears that petitioner seeks to state a cumulative error claim. Accordingly, the court addresses respondents' grounds 5E, 5F, and 5G as one cumulative error claim enumerated as 5E.

1 to effective assistance of counsel was violated because counsel failed to object to Judge Bell presiding  
2 over the motion in limine hearing occurring on May 14, 2008 instead of Judge Lohrer. In ground 4C,  
3 petitioner claims that his right to effective assistance of counsel was violated because “procedural failure  
4 is attributable to intentional decision by a rogue court-appointed attorney but not made in interest of  
5 client.” In ground 5E, petitioner claims that his right to due process was violated by the state district  
6 court’s cumulative errors because it: (1) responded to juror questions without consulting with counsel;  
7 (2) limited defendant’s presentation of the evidence regarding the violent character of victim Kevin  
8 Tippens; and (3) ordered defendant committed without probable cause hearing or his presence.

9 Grounds 1A, 1B, 2A, 2C, 4C, and 5E constitute bald legal conclusions devoid of the necessary  
10 factual support to state viable claims for habeas relief. Petitioner provides few, if any, factual allegations  
11 in asserting any of these claims. Even with the benefit of liberal construction, grounds 1A, 1B, 2A, 2C,  
12 4C, and 5E fail to state claims and must be dismissed as conclusory.

13 However, grounds 2B and 2D are sufficient plead so that they must be addressed on the merits.  
14 In ground 2B, petitioner claims that his right to effective assistance of counsel was violated because his  
15 court-appointed attorney failed to raise certain claims on direct appeal despite petitioner’s request that  
16 he raise those claims. In ground 2D, petitioner claims that his right to effective assistance of counsel  
17 was violated because his court-appointed attorney failed to mention self defense or evidence showing  
18 petitioner was robbed in either his opening or closing statement. In liberally construing petitioner’s  
19 allegations, the court concludes that grounds 2B and 2D contain sufficient factual detail requiring  
20 disposition on the merits. Accordingly, respondents’ motion to dismiss grounds 2B and 2D as  
21 conclusory is denied. In their answer, respondents shall address the merits of grounds 2B and 2D.

## 22 **V. Procedural Default**

23 Respondents move to dismiss grounds 1C and 5A as procedurally defaulted. Respondents argue  
24 that the Nevada Supreme Court held that these grounds were barred by Nev. Rev. Stat. §§ 34.810(b) and  
25 34.810(3).

26 Petitioner contends that he was denied the effective assistance of counsel on direct appeal, which

1 constitutes good cause and prejudice to overcome the statutory bars imposed by the Nevada Supreme  
2 Court.

3 A. Procedural Default

4 “Procedural default” refers to the situation where a petitioner in fact presented a claim to the state  
5 courts but the state courts disposed of the claim on procedural grounds, instead of on the merits. A  
6 federal court will not review a claim for habeas corpus relief if the decision of the state court regarding  
7 that claim rested on a state law ground that is independent of the federal question and adequate to  
8 support the judgment. *Coleman v. Thompson*, 501 U.S. 722, 730-31 (1991).

9 The *Coleman* Court stated the effect of a procedural default, as follows:

10 In all cases in which a state prisoner has defaulted his federal claims in  
11 state court pursuant to an independent and adequate state procedural rule,  
12 federal habeas review of the claims is barred unless the prisoner can  
13 demonstrate cause for the default and actual prejudice as a result of the  
14 alleged violation of federal law, or demonstrate that failure to consider  
15 the claims will result in a fundamental miscarriage of justice.

16 *Coleman*, 501 U.S. at 750; *see also Murray v. Carrier*, 477 U.S. 478, 485 (1986). The procedural  
17 default doctrine ensures that the state’s interest in correcting its own mistakes is respected in all federal  
18 habeas cases. *See Koerner v. Grigas*, 328 F.3d 1039, 1046 (9th Cir. 2003).

19 To demonstrate cause for a procedural default, the petitioner must be able to “show that some  
20 *objective factor external to the defense* impeded” his efforts to comply with the state procedural rule.  
21 *Murray*, 477 U.S. at 488 (emphasis added). For cause to exist, the external impediment must have  
22 prevented the petitioner from raising the claim. *See McCleskey v. Zant*, 499 U.S. 467, 497 (1991).  
23 Ineffective assistance of counsel may satisfy the cause requirement to overcome a procedural default.  
24 *Murray*, 477 U.S. at 488. However, for ineffective assistance of counsel to satisfy the cause  
25 requirement, the independent claim of ineffective assistance of counsel, itself, must first be presented  
26 to the state courts. *Murray*, 477 U.S. at 488-89. In addition, the independent ineffective assistance of  
counsel claim cannot serve as cause if that claim is procedurally defaulted. *Edwards v. Carpenter*, 529  
U.S. 446, 453 (2000). With respect to the prejudice prong of cause and prejudice, the petitioner bears:

the burden of showing not merely that the errors [complained of]

1 constituted a possibility of prejudice, but that they worked to his actual  
 2 and substantial disadvantage, infecting his entire [proceeding] with errors  
 of constitutional dimension.

3 *White v. Lewis*, 874 F.2d 599, 603 (9th Cir. 1989) (citing *United States v. Frady*, 456 U.S. 152, 170  
 4 (1982)). If the petitioner fails to show cause, the court need not consider whether the petitioner suffered  
 5 actual prejudice. *Engle v. Isaac*, 456 U.S. 107, 134 n.43 (1982); *Roberts v. Arave*, 847 F.2d 528, 530  
 6 n.3 (9th Cir. 1988).

7 Here, in ground 1C, petitioner claims that his due process rights were violated because the trial  
 8 court committed constitutional error by allowing the motion in limine hearing before Judge Bell, who  
 9 was biased. In ground 5A, petitioner claims that his due process rights were violated because the state  
 10 failed to disprove self defense and the state district court failed to give a self defense instruction to the  
 11 jury.

12 Petitioner raised these arguments in his post-conviction petition in state court. In affirming the  
 13 district court's denial of petitioner's post-conviction petition on this ground, the Nevada Supreme Court  
 14 concluded that these arguments were "not proper for a post-conviction petition for writ of habeas corpus  
 15 absent a demonstration of good cause and prejudice for raising them. NRS 34.810(b)<sup>3</sup>; NRS 34.810(3)."  
 16 The Nevada Supreme Court concluded that petitioner failed to demonstrate any good cause or prejudice  
 17 and that the district court did not err in denying these claims. The Nevada Supreme Court explicitly  
 18 relied on Nev. Rev. Stat. § 34.810 as a procedural bar when it declined to review grounds 1C and 5A.  
 19 (*Id.*). The Ninth Circuit Court of Appeals has held that, at least in non-capital cases, application of the  
 20 procedural bar at issue in this case – Nev. Rev. Stat. § 34.810 – is an independent and adequate state  
 21 ground. *Vang v. Nevada*, 329 F.3d 1069, 1073-75 (9th Cir. 2003); *see also Bargas v. Burns*, 179 F.3d  
 22 1207, 1210-12 (9th Cir. 1999). Therefore, this court finds that the Nevada Supreme Court's holding that  
 23 grounds 1C and 5A are procedurally barred under Nev. Rev. Stat. § 34.810(1)(b) and Nev. Rev. Stat.  
 24 § 34.810(3) was an independent and adequate ground for the court's dismissal.

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 26 <sup>3</sup> Although the Nevada Supreme Court cited to "NRS 34.810(b)," it appears that this is a  
 typographical error and that the intended citation is NRS 34.810(1)(b).



1        B. Cause and Prejudice

2        As discussed above, if a claim is procedurally defaulted, federal habeas review of the claim is  
3        barred unless the petitioner can demonstrate cause for the default and actual prejudice as a result of the  
4        alleged violation of federal law, or demonstrate that failure to consider the claims will result in a  
5        fundamental miscarriage of justice. *Coleman*, 501 U.S. at 750.

6        Petitioner argues that the ineffective assistance of his appellate counsel on direct appeal  
7        constitutes cause for the default of grounds 1C and 5A. First, ground 2C of petitioner's federal habeas  
8        corpus petition contains a claim arguing the ineffective assistance of counsel that is similar, if not  
9        identical, to the argument petitioner presents with respect to the cause and prejudice analysis here. As  
10       discussed above, this ground fails to state a claim. Petitioner fails to provide any analysis or factual  
11       support beyond conclusory allegations. Because this argument fails to even state a cognizable  
12       independent ineffective assistance of counsel claim, it also fails to establish cause and prejudice with  
13       respect to overcoming the procedural default of ground 1C.

14       Second, as discussed above, for ineffective assistance of counsel to satisfy the cause requirement,  
15       the independent claim of ineffective assistance of counsel, itself, must first be presented to the state  
16       courts. In this case, petitioner failed to present an ineffective assistance of counsel claim to the Nevada  
17       Supreme Court based on counsel's failure to argue on direct appeal that the state failed to disprove self  
18       defense and the state district court failed to give a self defense instruction to the jury. Thus, the  
19       argument petitioner advances to overcome the procedural default of ground 5A is unexhausted because  
20       it was not presented to the state courts. Because an unexhausted claim of ineffective assistance of  
21       counsel cannot establish cause, petitioner fails to show cause for the procedural default of ground 5A.  
22       Accordingly, the court dismisses grounds 1C and 5A as procedurally defaulted.

23       **VI. Petitioner's Options Regarding Unexhausted Claims**

24       A federal court may not entertain a habeas petition unless the petitioner has exhausted available  
25       and adequate state court remedies with respect to all claims in the petition. *Rose v. Lundy*, 455 U.S. 509,  
26       510 (1982). A "mixed" petition containing both exhausted and unexhausted claims is subject to

1 dismissal. *Id.* In the instant case, the court finds grounds 5B and 5D are unexhausted. Because the  
 2 court finds that the petition is a “mixed petition,” containing both exhausted and unexhausted claims,  
 3 petitioner has these options:

- 4 1. He may submit a sworn declaration voluntarily abandoning the unexhausted  
 5 claims in his federal habeas petition, and proceed only on the exhausted claims;
- 6 2. He may return to state court to exhaust his unexhausted claims, in which case his  
 7 federal habeas petition will be denied without prejudice; or
- 8 3. He may file a motion asking this court to stay and abey his exhausted federal  
 9 habeas claims while he returns to state court to exhaust his unexhausted claims.

10 *See Rose v. Lundy*, 455 U.S. 509, 510 (1982); *Rhines v. Weber*, 544 U.S. 269 (2005); *Kelly v. Small*, 315  
 11 F.3d 1063 (9th Cir. 2002); *King v. Ryan*, 564 F.3d 1133 (9th Cir. 2009).

12 Petitioner’s failure to choose any of the three options listed above, or seek other appropriate relief  
 13 from this court, will result in his federal habeas petition being dismissed. Petitioner is advised to  
 14 familiarize himself with the limitations periods for filing federal habeas petitions contained in 28 U.S.C.  
 15 § 2244(d), as those limitations periods may have a direct and substantial effect on whatever choice he  
 16 makes regarding his petition.

## 17 **VII. Conclusion**

18 **IT IS THEREFORE ORDERED** that petitioner’s motion for copies of trial transcripts (ECF  
 19 No. 10) is **DENIED as moot**.

20 **IT IS FURTHER ORDERED** that respondents’ motion to substitute party (ECF No. 24) is  
 21 **GRANTED**. The clerk **SHALL** substitute Renee Baker for E.K. McDaniel as a respondent in this  
 22 action.

23 **IT IS FURTHER ORDERED** that respondents’ motion to dismiss the petition (ECF No. 16)  
 24 is **GRANTED in part, and DENIED in part**, as follows:

- 25 1. The motion to dismiss grounds 5B and 5D as unexhausted is **GRANTED**.
- 26 2. The motion to dismiss grounds 1A, 1B, 2A, 3D, 5E, and 6B(1)-(5) as unexhausted is  
**DENIED**.
3. The motion to dismiss grounds 1C and 5A as procedurally defaulted is **GRANTED**.

